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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1101

JOHN W. SLATER, JR.,

Petitioner,

v.

WILLIAM ORIE TARVER, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 20

APPENDIX A - Judgment and Order of Court of Appeals 21

B - Constitution and Statutes 23

CITATIONS

CASES:

Bank of Columbia v. Okely, 4 Wheat. 235 . . . . . 12, 15

Brosnan v. Brosnan, 53 App. D.C. 149, 289 Fed. 547 . . . . 18, 19

In Re Estate of Patten, 18 D.C. 392 . . . . . 18, 19

Guthrie v. Welch, 24 App. D.C. 562 19

Hawley v. Hawley, 72 App. D.C. 357, 114 F.2d 505 19

Henry v. Grimes, 118 U.S. App. D.C. 160, 334 F.2d 550 19

Hutchins v. Hutchins, 48 App. D.C. 286 14

Kenaday v. Sinnott, 21 S.Ct. 233, 179 U.S. 606, 45 L.Ed. 344 14

Marbury v. Madison, 1 Cranch 137 11

Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272 . . . . . 17, 19

Perkins v. Berger, 79 U.S. App. D.C. 286, 145 F.2d 856 19

Scott v. Sanford, 19 How. 393 12

Sinnott v. Kenaday, 14 App. D.C. 1 13

Truax v. Corrigan, 42 S.Ct. 124, 257 U.S. 312, 66 L.Ed. 254 . . . . . 17, 19

Tuohy v. Hanlon, 18 App. D.C. 225 14

Williams v. Williams, 24 App. D.C. 214 18

CONSTITUTION AND STATUTES:

Constitution of the United States 11

Constitution of the United States, Amendment 5 . . . . . 15, 18

Magna Charta (issue of 1225), Chapter 29 16

28 Edw. III (1355), Chapter 3 17

Act of Mar. 3, 1901, c. 854, Sec. 119, 31 Stat. 1208, D.C. Code 1961, Sec. 11-504 19

Act of Mar. 3, 1901, c. 854, Sec. 138, 31 Stat. 1212, D.C. Code 1961, Sec. 19-303 4

MISCELLANEOUS:

2 Bl. Com. 503 13
2 Bl. Com. 504 13
2 Bl. Com. 507 13
Blackstone Commentaries, Edited by William Carey Jones, 1916, Vol. I (Book II), page 1394 13
23 Cong. Rec. 6516 (1892) 11
Constitution of the United States Annotated (Senate Document No. 39, 88th Congress, 1st Session) 11
The Institutes, Part 2, 50-51 (1817) 17
Mott, Due Process of Law, 1926, page iii 11

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John W. Slater, Jr. petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on June 29, 1965.

OPINIONS BELOW

There are no opinions delivered in the courts below.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1965 (App. A, infra, p. 21). Petition for rehear-

ing was denied on October 7, 1965, and an order was entered on that date (App. A, infra, p. 22). An order of this Court was entered on January 4, 1966, extending time to file petition for writ of certiorari to and including February 4, 1966. An order of this Court was entered on February 5, 1966, further extending time to file petition for writ of certiorari to and including March 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the revocation of letters testamentary is a violation of substantive due process of law under the Fifth Amendment of the Constitution of the United States where no causes as provided by the statute governing the revocation of letters testamentary were alleged nor proved.

2. If the first question is answered negatively, whether the removal of an executor is a violation of procedural due process of law under the Fifth Amendment of the Constitution of the United States where no causes for removal were presented by formal pleading, and where there was no trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the Fifth Amendment of the Constitution of the United States (U.S.C., Constitution, Amendment 5) is set forth in Appendix B, infra, p. 23.

The relevant portion of the statute governing the revocation of letters testamentary (Act of Mar. 3, 1901, c. 854, Sec. 119, 31 Stat. 1208, D.C. Code 1961, Sec. 11-504) is set forth in Appendix B, infra, p. 23.

The relevant portion of the statute governing the appointment of a guardian ad litem (Act of Mar. 3, 1901, c. 854, Sec. 138, 31 Stat. 1212, D.C. Code 1961, Sec. 19-303) is set forth in Appendix B, infra, p. 23.

STATEMENT

The decedent, Mattie Belle Spencer, died in and resident of, the District of Columbia on August 7, 1963. She left a will dated January 9, 1962, in which the petitioner is named executor.

The jurisdiction of the United States District Court for the District of Columbia, sitting as a Probate Court, was invoked under Chapter 5 (Sections 11-501 through 11-520) of Title 11 of the District of Columbia Code, 1961 Edition.

The known heirs at law and next of kin are: a brother, Frank Clifford Tarver; a brother, William Orie Tarver; and a sister, Irma Joy Owens. They are the caveators and appellees below.

The testatrix had mentioned to the petitioner that she had another brother, without naming him, who had been missing for many years and who, when last seen, appeared to be of not entirely normal behavior.

Shortly after the death of the testatrix, petitioner attempted to elicit information concerning the missing brother from the said heirs at law and next of kin through their attorney, Joseph H. Newlin, in the District of Columbia, and thereafter petitioner continued a prolonged search in this respect, as discussed more fully hereinafter. (R., petitioner's affidavit, filed June 24, 1964) No information was received from Mr. Newlin.

Thereupon, petitioner made extensive research as to proper procedure and discussed the matter with the Register of Wills (who is also clerk of the probate court) and his staff on numerous occasions (R., petitioner's affidavit, filed June 24, 1964). Petitioner was faced with the decision as to what he, as executor, should do under the circumstances. His analysis prompted him to consider four alternatives, viz.: (1) Petition for probate and letters testamentary; (2) Petition for probate and letters testamentary, and the appointment of a guardian ad litem; (3) Take steps to have the missing brother declared legal-

ly dead; and (4) Conduct an investigation in an attempt to determine if the brother was still living and whether legally competent.

Not knowing how long the investigation under (4) might take, and with the uncertainty of the results thereof, and not wishing to delay administration proceedings, petitioner determined to present the facts to the court and abide by its decision. Accordingly, on October 4, 1963, petitioner filed with the probate court petition for probate and letters testamentary (JA 17). In order to acquaint the court with the aforesaid facts, petitioner included in paragraph 5 of said petition the following: "That said testatrix mentioned to this petitioner that there was another brother of testatrix who appeared to be non compos and who had disappeared and whose whereabouts were unknown; that the name of said brother is not known to this petitioner." In the second prayer of said petition, he asked "That a guardian ad litem may be appointed to represent the non compos brother of the above named testatrix (whose name and whereabouts are unknown), at the hearing of the application to admit the aforesaid will to probate."[1] In conformity with established procedure, said petition was filed with the Register of Wills for presentation to the court.

Thereafter, the Register of Wills advised petitioner that said petition had been presented to the court and that the court could not appoint a guardian ad litem under the circumstances set forth therein. On December 3, 1963, petitioner filed amended petition for probate and letters testamentary (JA 19). With certain additional information which petitioner had then obtained, he included in paragraph 5 of said amended petition the following: "That

---

[1] The term "non compos" was employed to follow the language of the statute (Act of Mar. 3, 1901, c. 854, Sec. 138, 31 Stat. 1212, D.C. Code 1961, Sec. 19-303) governing the appointment of a guardian ad litem, and not to establish the fact of incompetency of the brother of the testatrix.

said testatrix mentioned to this petitioner that there was another brother of testatrix who appeared to be non compos and who had disappeared and whose whereabouts were unknown; that after diligent search petitioner has been able to ascertain the following information: (a) the name of the missing brother is Marion Austin Tarver; (b) he was born September 18, 1905, in Montgomery, Alabama; (c) he was last seen by the next of kin in the early 1930's; (d) none of the next of kin knows of any legal commitment as a non compos; and (e) to the best knowledge, information and belief of petitioner, he was never married." This information was for purposes of effecting process by citation and publication as required by statute. Petitioner did not ask for the appointment of a guardian ad litem.

Process by citation and publication was effected pursuant to statute. No question in this respect has been raised in the proceedings below.

On February 7, 1964, the will was admitted to probate and letters testamentary granted to the petitioner (JA 1).

Although petitioner believes he would have been fully justified in handling the matter as to the missing brother by having him declared legally dead (and he will do so when these appellate proceedings are disposed of), nevertheless, he went to what he considers far beyond the "call of duty" and continued the investigation, which involved a total of twenty-six documents. (R., petitioner's affidavit, filed June 24, 1964). Based upon information ultimately obtained, petitioner made inquiry of Western State Hospital, State of Tennessee, concerning the missing brother. On March 16, 1964, said hospital dispatched to petitioner a reply in which it was stated said Marion Austin Tarver was admitted May 21, 1932, as a committed patient from Shelby County, Tennessee, that he eloped from the hospital on March 3, 1935, that he was carried on elopement status until April 6, 1935, and that he was officially discharged on April 30, 1936.

Thereafter, petitioner communicated with the Shelby

County Court, which, on April 6, 1964, dispatched a letter stating their records showed the said Marion Austin Tarver was committed to Western State Hospital on May 21, 1932, and that no order of restoration of sanity had been had.

Petitioner thereupon determined that he should petition the court for the appointment of a post-probate guardian ad litem for said non compos. As he had done many times previously, he discussed the matter with the Register of Wills and his staff. The Register of Wills was of the opinion that the petition should request the confirmation of the aforesaid order of February 7, 1964, in addition to the appointment of the guardian ad litem. Since the appointment of the guardian ad litem was a post-probate matter, petitioner did not see that the previous order was involved, but at the same time he did not consider there would be any harm done in confirming the previous order, and he did not attach sufficient significance to the matter to voice strong opposition thereto (not foreseeing the involvement thereafter to ensue). Accordingly, petitioner prepared "Petition For Confirmation of Order Admitting Will To Probate and Granting Letters Testamentary And For Appointment of Guardian Ad Litem" (JA 21) and proposed order to be submitted with the Petition to the probate court. These were discussed in detail with the Register of Wills and his staff and were considered to be in proper form. On April 29, 1964, order as submitted was entered (JA 2), ratifying and confirming the order of February 7, 1964, and appointing Harry L. Ryan, Jr., a member of the bar of the Court, as guardian ad litem for the said non compos, Marion Austin Tarver.

Some time thereafter, the Register of Wills took the position that the portion of the order of April 29, 1964, which ratified and confirmed the order of February 7, 1964, was premature, and he requested petitioner to prepare an order vacating that portion of the said order of April 29, 1964. Petitioner did not agree with the Register of Wills and did not comply with his request. Peti-

tioner did not agree for the reason that he felt, as indicated hereinbefore, that the request for the appointment of a post-probate guardian ad litem did not involve the validity of the order of probate, and that he had assumed the legal principle in the mind of the Register of Wills had been that he considered the confirmation of the probate order desirable only for the purpose of the appointment of the guardian ad litem, and not, as thereafter manifested, that the confirmation of the probate order was contingent on the report of the guardian ad litem, as discussed hereinafter.

When petitioner did not comply with the request of the Register of Wills, he (Register of Wills) prepared an order and submitted it to the court, with an accompanying memorandum (JA 26). It is to be noted that the Register of Wills expressed, in the accompanying memorandum, his opinion that the portion of the order of April 29, 1964, ratifying and confirming the order of February 7, 1964, was premature, "inasmuch as Harry L. Ryan, Jr., guardian ad litem for a non compos, had not yet filed his answer and report on behalf of said non compos, which was necessary to be done before an order for confirmation could be entered."

In passing, petitioner feels duty bound to make the point that the opinion expressed by the Register of Wills is so fantastic as hardly to merit serious consideration. Upon what theory of law does he conclude that the report of the guardian ad litem, appointed post-probate, can determine the validity or invalidity of the order of probate?

The court rejected the order submitted by the Register of Wills. It prepared its own order, which it signed and sent to the Register of Wills for entry. The Register of Wills objected to that order and, on June 9, 1964, submitted to the court a memorandum stating his reasons for his objections (JA 27). It is to be noted that the Register of Wills objected to the order prepared by the court because "it would appear to revoke in its entirety the grant of pro-

bate and letters under the order of February 7, 1964." (Penultimate paragraph of the memorandum.)

In the third paragraph of said memorandum, the Register of Wills states: "* * * [after probate] the Executor learned that one of the heirs who had been duly proceeded against by publication prior to the aforesaid order admitting the will and granting letters, was non compos mentis *and that he should have been represented by a guardian ad litem.*" (Emphasis added) The Register of Wills has employed language which would appear to convey the idea that the petitioner (executor) considered the non compos mentis "should have been represented by a guardian ad litem" at the time of probate, which is a distortion of the facts. Had it been known at the time of probate that the brother was non compos, then, of course, he should have been represented by a guardian ad litem. But it was not known, at the time of probate, that the brother was non compos, despite the prolonged efforts on the part of petitioner to ascertain the whereabouts and condition of the brother, and this in the face of non-cooperation on the part of the known heirs at law and next of kin.

At this juncture of the case, the aforesaid heirs at law and next of kin (Frank Clifford Tarver, William Orie Tarver, and Irma Joy Owens) filed, on June 10, 1964, petitions for caveat. A separate petition was filed by each, but the wording is identical except for the designation of the caveator in each case. Paragraph 4 of the petitions states: "That petitioner is advised that a period of at least several months will elapse before a determination of the issues to be framed upon the caveat can be had, and petitioner accordingly states that a collector should be appointed to collect, conserve and administer the assets of the estate of the decedent, pending the conclusion of this litigation"; and the fourth prayer asked "That a collector or collectors of the estate of the deceased may be appointed to serve under bond until the termination of this caveat proceeding." (JA 3)

On the following day, to-wit, June 11, 1964, petitioners filed, through their attorney, Mr. Newlin, a motion entitled "Motion To Deny or Revoke Administration of Will, To Revoke Letters Granted John W. Slater, Jr. and to Appoint a Collector To Take Charge of Estate Pending Termination of Caveat Proceedings." (JA 4) Said motion was signed by Mr. Newlin, attorney for the caveators and was not supported by any affidavit. It advanced the following grounds:

> 1. The Will of Mattie Belle Spencer was inadvertently admitted to probate and letters granted by order of February 7, 1964.
>
> 2. A petition for appointment of Guardian Ad Litem was filed April 28, 1964; Guardian Ad Litem has been appointed, but has not yet filed his report.
>
> 3. Petition for Caveat was filed on May [sic] 10, 1964 by personal representatives [sic] and heirs at law, whose interest will be adversely affected by a denial of this motion.
>
> 4. There will be no irreparable damage to the Estate by the granting of this motion.

By this time, petitioner had done most of the work in the administration of the estate, notice had been given to creditors, and there remained little to be done to conclude administration proceedings. Believing that the post-probate caveats and motion did not advance any adequate grounds, pursuant to the statute of the District of Columbia for the removal of an executor, petitioner moved, on June 17, 1964, to strike the caveators' motion (JA 5).

Thereafter, on June 19, 1964, the caveators, through their attorney, filed an opposition to petitioner's motion to strike (JA 5), advancing the following reasons for denying said motion to strike:

> 1. At the time the Petition for probate and letters Testamentary was filed the petitioner (Caveatee) knew or should have known of the possible existence of Marion Austin Tarver, an adjudged

incompetent, and should have taken steps to have a Guardian Ad Litem appointed to protect his possible interest.[2]

2. John W. Slater Jr. at the present time has not been confirmed as executor and the order sought to be confirmed was entered absent appointment of a guardian ad litem for the incompetent, and cannot therefore be retroactively confirmed.

3. The caveators motion is well founded and the granting of this motion is the only action that will adequately protect all parties.

In the meantime, Mr. Ryan, the guardian ad litem, had embarked upon an exhaustive investigation. This he completed and on June 18, 1964, filed his report with the court (R., Report of Guardian Ad Litem, filed June 18, 1964). Mr. Ryan did not find any grounds to support the filing of a caveat on behalf of said Marion Austin Tarver, and he advanced no charge of irregularities on the part of petitioner in the proceedings.

Thereafter, the aforesaid motions came on for hearing. No testimony was introduced. Without opinion, the court denied petitioner's motion to strike and granted caveators' motion. On July 29, 1964, the court entered order revoking letters testamentary and appointed Joseph A. Rafferty, Jr., a member of the Bar of the court, collector, with full power and authority "to discharge pendente lite all the duties of an administrator" (JA 7).

The Court of Appeals affirmed the order of the probate court. Its judgment, without opinion, was entered on June 29, 1965 (App. A, infra, p. 21). Petition for rehearing was denied on October 7, 1965, and an order was entered on that date (App. A, infra, p. 22).

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[2]As concerning this allegation, Mr. Hogan, who succeeded Mr. Newlin as attorney for the caveators, thereafter stipulated that the petitioner did not know at the time the petition for probate was filed, that said Marion Austin Tarver had been adjudicated incompetent (JA 14, 15).

REASONS FOR GRANTING THE WRIT

The government of the United States is a "government of laws, and not of men" (*Marbury v. Madison*, 1 Cranch 137, 163); and the Constitution of the United States is the "supreme law of the land" (Ibid., at page 180).

The judicial review exercised by this Court of the Constitution is "the glory and ornament of our system which distinguishes it from every other government on the face of the earth" because this Court is "a great and mighty power hovering over the Constitution of the land to which has been delegated the awful responsibility of restraining all the coordinate departments of the Government within the walls of that great fabric which our fathers builded for our protection and our immunity forever" (Chief Justice Edward Douglas White, in speech made shortly before ascending the Bench of this Court, 23 Cong. Rec. 6516 (1892)).

Encompassed within the "walls of that great fabric" is the precious guaranty of due process of law (Fifth Amendment of the Constitution). So vast and important is this protection (that no person shall be deprived of "life, liberty, or property without due process of law"), that it has provoked more litigation in this Court than has any other part of the Constitution (Mott, Due Process of Law, 1926, page iii). Fully a quarter of the pages of the "Constitution of the United States of America Annotated" (Senate Document No. 39, 88th Congress, 1st Session) deal with cases in which this Court has been asked to protect private interests of one kind or another against legislation alleged to invade "liberty" or "property" contrary to due process of law (Ibid., page 17).

Original procedural due process began its expansion into substantive due process in the prophetic dictum of Justice William Johnson of this Court in 1819, when he declared:

> As to the words from the Magna Charta * * * after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice" (*Bank of Columbia v. Okely*, 4 Wheat. 235, 244).

Thirty-eight years thereafter, in 1857, that prophecy of the transition of due process from procedural law into substantive law became fulfilled in the famous Dred Scott case (*Scott v. Sanford*, 19 How. 393, 450), in which Section 8 of the Missouri Compromise, whereby slavery was excluded from the territories, was held void under the Fifth Amendment, not on the ground that the procedure for enforcing it was not due process of law, but because the Court regarded it as unjust to forbid people to take their slaves, or other property, into the territories, the common property of all the States.

Into the hallowed sanctuary of this protective shrine comes your petitioner, drenched in juridical contumely — not the ordinary contumely carrying merely the sting of the scornful word, but the more penetrating contumely inflicting the stunning blow of cold judicial silence.

As envisioned by our illustrious fathers, this Court is the protector of the basic rights conferred by the Constitution, dispensing justice tempered with mercy — a mercy whose quality is not strained but "droppeth as the gentle rain from heaven."

It is in respect of the very warp and woof of that "great fabric" that your petitioner lays himself at the seat of the benign justice and mercy of this most honorable Court. The wrong which petitioner respectfully seeks to be righted by this august tribunal stems from the most sacred and zealously guarded of all rights — the rights of those who cannot act and speak for themselves. With unequalled vigilance does our judicial system protect the inherent

rights of that class of individuals which are incapacitated from pleading their own cause. As to the unborn child, the minor, the incompetent, and the deceased, man-made law has commerce nigh unto the fountain of Divine law.

The matter here presented emerges as the solemn wish of one departed from this life. The decedent, Mattie Belle Spencer, expressed the wish, by means of the grave and sublime instrument of her last will and testament, that the petitioner serve as the executor of her estate. The right of one to name the executor of his or her estate is too well established to require argument. A testator is vested with legal dominion over his estate to dispose of it under the forms of law as he may deem advisable. He is vested with power to name executors, who are his trustees to see that his wishes are carried out; and it is their duty to defend his wishes until the document giving them authority to act has been legally annulled.

An executor is he to whom another man commits by will the execution of that his last will and testament (2 Bl. Com. 503). This was the law so early as the reign of Henry II, when Glanvil informs us that "testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit * * *" (Id., 504) ("those should be executors of a will whom testator shall have chosen, and to whom he himself shall have committed the trust, * * *," Blackstone Commentaries, edited by William Carey Jones, 1916, Vol. I (Book II), page 1394).

An executor may do many acts before he proves the will; for he derives his power from the will and not from the probate. 2 Bl. Com. 507.

The right to the office of executor and its protection have been recognized consistently by the courts of the District of Columbia, where the decedent was domiciled and died and where the will was made.

In the case of *Sinnott v. Kenaday*, 14 App. D.C. 1, 21, the court stated that "the executor, as is well understood,

derives his title as executor from the will of the testator." That case was affirmed by this Court in *Kenaday v. Sinnott*, 21 S.Ct. 233, 179 U.S. 606, 45 L.Ed. 344.

Thereafter, in the case of *Tuohy v. Hanlon*, 18 App. D.C. 225, 231, the court said:

> We cannot subscribe to the theory that in this District whatever the doctrine may be elsewhere, an executor derives his authority from the probate court, and not from the will of the deceased person. On the contrary, we have distinctly held, in accordance with precedent, and with that which we may regard as the common law of England on the subject, that an executor, differing radically in this regard from an administrator, derives his authority from the will, and not from the court wherein he becomes qualified to act. Sinnott v. Kenaday, 14 App. D.C. 1; 2 Blackstone's Commentaries, 507. And that ruling has been affirmed by the Supreme Court of the United States on appeal. Kenaday v. Sinnott, 179 U.S. 615. So, it must be regarded as settled law with us that an executor, although held as a trustee for all the purposes of the law and required to administer that trust under the direction and authority of the tribunal specifically provided for that purpose, derives his interest in the estate of the deceased entirely from the will, and becomes vested with that interest from the moment of the testator's death. He may do many things which an administrator is not entitled to do; as, for example, to bury the deceased in a manner suitable to the estate which he has left. In fact, the great commentator on the English law, at the place above cited, 2 Com. 507, says that he can do most of the things before the probate of the will which he may do afterwards."

There followed the case of *Hutchins v. Hutchins*, 48 App. D.C. 286, in which the court cited the *Tuohy* case, supra, quoted therefrom as is quoted immediately above, and observed:

> A testator is vested with legal dominion over his estate to dispose of it under the forms of law as he may deem advisable. He is vested with power to name executors, who are his trustees to see that his wishes are carried out; and it is their duty to

> defend his wishes until the document giving them authority to act has been legally annulled. It is a trust which, when accepted by propounding the will for probate, attaches, and it is doubtful if it could then be avoided except by permission of the court * * *. (Ibid, p. 290) An executor derives his appointment from the testator, which appointment is approved and letters testamentary are issued as an incident of probate proceedings. Hence, the contention that he is not an executor until after probate is a fictitious assumption. He is an executor for the duties to be performed before probate to exactly the same extent that he is an executor for the duties to be performed after probate. (Ibid., p. 291)

From the foregoing it is unmistakably clear that the office of executor is a property right derived directly from the will of the testator, that it vests immediately upon the death of the testator, and that it remains vested until such time as the will might be declared void by legal means. As such, the office constitutes "property" within the context of the Fifth Amendment and embodies substantive due process of law, secured from the "arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice" as propounded in *Bank of Columbia v. Okely*, supra.

Your petitioner is the executor named by the testatrix, Mattie Belle Spencer. That office is a right protected by the substantive due process of law of the Fifth Amendment. The will of said testatrix has been admitted to probate and probate thereof has not been revoked. Letters testamentary were granted and issued to your petitioner. Your petitioner has been deprived of his Constitutional right by the revocation of letters testamentary. That deprivation has been inflicted by the cold and silent "arbitrary exercise of the powers of government," to-wit, the mute judgments of the two courts below with not a single word of explanation of their judgments. Could there be a more flagrant violation of substantive due process of law?

To engage in speculation as to the principle of law applied in the judgment of the probate court, and its affirmation by the court of appeals, would be a hopeless task. The ineluctable quiddity propounded by the judgments, clothed in silence by the judicial Androsphinxes of the courts below, is more perplexing than the riddle posed by the ancient Sphinx of Thebes.

Were one to conjecture as to the law applied, on the assumption that it stems from some reasoning advanced by the adversaries of your petitioner, he would be faced with a formidable array of possibilities. The respondents (appellees) inaugurated their campaign to dethrone your petitioner in their post-probate petitions for caveat (JA 3). They expanded their program in their "Motion To Deny or Revoke Administration of Will, To Revoke Letters Granted John W. Slater, Jr. and To Appoint a Collector To Take Charge of Estate Pending Termination of Caveat Proceedings" (JA 4). They staged a third phase in their "Opposition To Caveatee's Motion To Strike Caveators' Motion To Deny or Revoke Administration of Will, To Revoke Letters Granted John W. Slater, Jr. and To Appoint a Collector To Take Charge of Estate Pending Termination of Caveat Proceedings" (JA 5). Finally, respondents climaxed their efforts in the appellate proceedings by abandoning all previously advanced reasons and embarked upon an entirely new path (Brief for Appellees). Thus, the principle of law applied, if based on one of the reasons advanced by respondents, could be one of a possible multitude of principles.

Your petitioner has been deprived not only of substantive due process of law but of procedural due process as well. Procedural due process of law has been recognized from time immemorial. In Chapter 29 of the Magna Charta (issue of 1225), the King promises that "no free man (*nullus liber homo*) shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or any man destroyed, nor shall we come upon him or send against him, except by a legal judgment

of his peers or by the law of the land (*per legem terrae*)." Thereafter, chapter 3 of 28 Edw. III (1355) provided: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he brought to answer by due process of law."

Lord Coke equates the term "by law of the land" with "by due process of law," which, in turn, he defines as "by the indictment or presentment of good and lawful men * * * or by writ original of the Common Law." The Institutes, Part 2, 50-51 (1817).

The foregoing history and meaning of the "due process" provision is recognized by this Court in the case of *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272 (1856). There the question was whether certain proceedings under a Federal statute deprived a collector of customs of his liberty and property in violation of the Fifth Amendment. While the Court held that the collector of customs, being a "public debtor," did not come within the provisions of the Fifth Amendment, it considered the basic aspects of said Amendment and stated: "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Charta," referring to the aforesaid commentary of Lord Coke (Id., 276). The Court continued: "* * * 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding," citing 2 Inst. 47, 50, and cases (Id., 280).

Spanning the years, this Court has consistently held inviolate the protection of the procedural due process of law, embodying the foregoing early concept in its many decisions. A typical example is found in *Truax v. Corrigan*, 42 S.Ct. 124, 129, 257 U.S. 312, 332, 66 L.Ed. 254, 263, where the Court held that due process requires that "every man shall have the protection of his day in court, and the benefit of the general law, a law which hears be-

fore it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

This basic principle of law has been applied in the District of Columbia in the protection of the office of executor, as well as the office of administrator. In the early case of *In Re Estate of Patten*, 18 D.C. 392, the court stated: "The position of an executor is a valuable office, from which he should not be deposed without the opportunity of defense * * *." (Ibid., 400) "Indeed there is nothing more firmly imbedded in our jurisprudence, constitution, and laws, than the principle that a man is not to be condemned without a hearing, nor to be deprived of his property or rights without having been first afforded an opportunity of defending himself in the courts" (Ibid., 406) Similar protection is accorded the office of administrator, even though the right to that office is derived from statute rather than from the testator. Once regularly appointed and qualified, an administrator "cannot be removed without notice and a trial. * * * he is entitled to his day in court—in other words, to a trial upon the evidence—and at such a trial the petition is to be regarded as a pleading only, and not as evidence." *Brosnan v. Brosnan*, 53 App. D.C. 149, 152, 289 Fed. 547, 550. See also *Williams v. Williams*, 24 App. D.C. 214, 217.

In the face of the foregoing principle of law, petitioner was removed from the office of executor without "his day in court," that is, without "a trial upon the evidence." In short, he was deprived of procedural due process of law as guaranteed by the Fifth Amendment of the Constitution. Instead of a trial upon the evidence, the probate court entered its order revoking letters testamentary "upon consideration of the Motion of the Caveators [respondents]," as recited in the order itself (JA 7). The court proceedings consisted solely of a hearing on the motion. Respondents presented no evidence. A hearing of argument

by counsel on a motion is not "*actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding" (*Murray's Lessee v. Hoboken Land and Improvement Co.*, supra); it does not extent to petitioner "his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial" (*Truax v. Corrigan*, supra); it does not accord petitioner the rights under the "principle that a man is not to be condemned without a hearing, nor to be deprived of his property or rights without having been first afforded an opportunity of defending himself in the courts" (*In Re Estate of Patten*, supra); nor does it furnish petitioner "his day in court, * * * a trial upon the evidence" (*Brosnan v. Brosnan*, supra).

With their prodigious efforts, respondents overlooked one essential element: they failed to be governed by the controlling statute which sets forth the grounds for revoking letters testamentary. Included in the restricted jurisdiction of the probate court is the power "* * * to grant, and, for any of the causes hereinafter mentioned, to revoke letters testamentary * * *." (Act of Mar. 3, 1901, c. 854, Sec. 119, 31 Stat. 1208, D.C. Code 1961, Sec. 11-504). Unless power to remove an executor (or administrator) for a particular cause can be found in the statute, or by necessary inference therefrom, that power does not exist. *Henry v. Grimes*, 118 U.S. App. D.C. 160, 161, 334 F.2d 550, 551; *Perkins v. Berger*, 79 U.S. App. D.C. 286, 145 F.2d 856; *Hawley v. Hawley*, 72 App. D.C. 357, 358, 114 F.2d 505, 506; *Guthrie v. Welch*, 24 App. D.C. 562, 567. The statutory "causes" for which an executor (or administrator) may be removed are set forth in detail in *Hawley v. Hawley*, 72 App. D.C. 357, 358, 114 F.2d 505, 506. None of the many reasons advanced by respondents falls within the statutory grounds, nor do respondents claim that they fall within said statutory grounds.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed June 29, 1965]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,129 September Term, 1964
Admin.No. 109,635

John W. Slater, Jr.,
Appellant,

v.

William Orie Tarver, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia.

Before: Prettyman, Senior Circuit Judge and Danaher and Wright, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed, and it is

FURTHER ORDERED by the court that appellees herein recover from appellant their taxable costs on this appeal, and have execution therefor.

Per Curiam.

Dated: JUN 29 1965

[Filed October 7, 1965]

* * *

[Caption omitted]

* * *

Before: Bazelon, Chief Judge, Fahy, Washington, Danaher, Burger, Wright, McGowan, Tamm and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's petition for rehearing en banc, it is

ORDERED by the court en banc that appellant's aforesaid petition is denied.

Per Curiam.

Dated: OCT 7 1965

Circuit Judge Tamm did not participate in the foregoing order.

APPENDIX B

Fifth Amendment of the Constitution of the United States:

> "No person shall * * * be deprived of * * * property, without due process of law; * * *." (U. S. Code, Constitution, Amendment 5).

Statute governing revocation of letters testamentary:

> "It [the probate court] shall have full power and authority * * * to grant and, for any of the causes hereinafter mentioned, to revoke letters testamentary * * *." (Act of Mar. 3, 1901, c. 854, Sec. 119, 31 Stat. 1208, D.C. Code 1961, Sec. 11-504).

Statute governing appointment of guardian ad litem:

> "Whenever it shall appear that any party interested * * * is * * * non compos, the court shall appoint a guardian ad litem to represent said party at the hearing of the application to admit the will to probate, and with authority to file a caveat, as he may be advised, in behalf of said party." (Act of Mar. 3, 1901, c. 854, Sec. 138, 31 Stat. 1212, D.C. Code 1961, Sec. 19-303).